UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 11-cv-99 (JGM)
PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM H. SORRELL, in his official capacity as ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE and DAVID COEN, in their official capacities as MEMBERS of THE VERMONT PUBLIC SERVICE BOARD,	)	
Defendants.	)	

MEMORANDUM OF LAW OF THE MASSACHUSETTS ATTORNEY GENERAL, AS AMICUS CURIAE, IN SUPPORT OF VERMONT DEFENDANTS

Massachusetts Attorney General Martha Coakley submits this memorandum on behalf of the Commonwealth of Massachusetts, as amicus curiae, in support of the State of Vermont. As in Massachusetts' Memorandum on Entergy's Motion for Preliminary Injunction (Document No. 58, filed June 13, 2011), Massachusetts will focus on Entergy's preemption claims, and particularly on Entergy's submission that the Court should rule on the basis of Vermont legislators' alleged motivations rather than upon the avowed purpose of the legislation in issue.

Preemption generally involves an objective analysis, and the Supreme Court has already made clear in just this context that if a statute has a purpose that has not been preempted, questions about whether legislators are acting with ulterior motivations should be left to Congress. This approach fits well with our constitutional system,

including the allocation of powers between the branches and between state and federal sovereigns.

Interests

The Commonwealth detailed its interest in this proceeding in its prior memorandum. Briefly, Massachusetts has a significant interest in defending State authority to regulate domestic power generating facilities, including nuclear power plants, notwithstanding the extension of federal authority over this industry in the past half century.

Numerous electricity-generating plants are located in the Commonwealth, including one existing and operational nuclear facility in Plymouth, Massachusetts, the Pilgrim Nuclear Power Station. This facility, and any other nuclear power plants that may be proposed, constructed or operated in the Commonwealth in the future, inherently have, or would have, associated with them a host of issues over which Massachusetts continues to have regulatory authority, including, for instance: the need for power generation, land use, environmental concerns, ratemaking, economic issues, safety and security concerns, and costs of construction, operation, transmission, short- and long-term waste disposal and management, spent nuclear fuel storage, and emergency response planning.

Entergy's arguments, which seek to hold State legislative action to a standard of motivational purity that legislatures seldom if ever attain, would as a practical matter greatly restrict State authority over matters concededly left to the States by Congress, contrary to the Supreme Court's teaching in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983) and other cases.

To preserve State authority to the full extent Congress intended, the Court should follow *Pacific Gas & Electric* in declining the invitation to inquire into motives, and should uphold the Vermont Legislature's action on the ground that the avowed purposes of the statutes in issue are not preempted.

Argument

I. PROPER PREEMPTION ANALYSIS MUST HONOR THE CONSTITUTIONAL LIMITATIONS ON THE SUPREMACY CLAUSE.

Entergy relies on an overly broad preemption analysis that lacks merit and should be rejected for the reasons set forth by Vermont. In addition, Entergy's arguments must be rejected because they fail to appreciate the constitutional limits on the Supremacy Clause. This amicus memorandum focuses on those constitutional underpinnings, which, when properly considered, prevent a preemption analysis from becoming "a freewheeling judicial inquiry" into broad policy objectives (or speculations about motives), because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *See Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (plurality opinion) (quotation and citations omitted). Rather, properly considered, the constitutional underpinnings of the Supremacy clause limit a preemption analysis to "whether the ordinary meanings of state and federal law conflict." *See Wyeth v. Levine,* 555 U.S. 555, 129 S.Ct. 1187, 1208 (2009) (Thomas, J., concurring) (quotation omitted).

The Supremacy Clause provides that: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2. With this clause, the framers vested in Congress an "extraordinary power." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991).

This power, to preempt state law, is truly remarkable in light of the framers' aim of designing a federalist scheme in which the Federal government has tempered powers. Indeed, the Constitution creates a delicate balance of powers between the dual federal and state sovereigns. *See e.g., Gregory* at 457-58 ("[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty *concurrent* with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory* at 457 (quotation omitted) (emphasis added).

As the following discussion shows, the Supremacy Clause must be construed and applied, not in isolation, but in the context of, and with strict adherence to, the limitations that arise from the structure and text of the Constitution, to maintain the delicate balance the framers sought as between the *concurrent* sovereigns. Application of preemptive effect outside these bounds would be untoward and impermissible.

A. As Dual Sovereigns, States Retain Numerous and Indefinite Powers.

"As every schoolchild learns, our Constitution establishes a system of *dual sovereignty* between the States and the Federal Government." *Gregory* at 457 (emphasis added). Under this constitutional system of *dual* or *concurrent* sovereigns, the framers intentionally created "a Federal Government of limited powers." *Id.* As provided in the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Thus, from the founding of the Union to modern times, it has been well recognized that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution, *see Gregory* at 457-58, in which the Supreme Court, quoting the Federalist No. 45, has stated:

> The powers delegated by the proposed Constitution to the federal government *are few and defined*. *Those which are to remain in the State governments are numerous and indefinite*. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Id. (citation omitted) (emphasis added).

The Supreme Court has repeatedly recognized that this constitutional scheme imposes upon the Federal Government a responsibility not to disrupt the intended balance of power unnecessarily or without willful intent, for good reason. *See e.g., Gregory* at 461 ("States retain substantial sovereign powers . . . with which Congress does not readily interfere"). The Supreme Court has long adhered to the view that "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *See New York v. United States,* 505 U.S. 144, 162 (1992), *quoting Texas v. White*, 7 Wall. 700, 725 (1869). The oft-quoted words of Justice Field explain:

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States-independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549-50 (1985) *citing Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) *quoting Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting). Thus, "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress." *Garcia* at 550-51.

As artfully expressed by the Supreme Court: "[i]n the tension between federal and state power lies the promise of liberty." *Gregory* at 459.

B. When Construed and Applied in Light of Our Dual-Sovereign, Constitutional Scheme, the Supremacy Clause May Not Abrogate States' Retained Powers Unless Preemptive Effect *Necessarily* Flows from the Federal Statute.

The upshot of the foregoing discussion is that constitutional safeguards of state sovereignty may not be overlooked in a preemption analysis. The Supreme Court has stated:

> As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

Gregory, at 460. Because of the gravity of restricting state sovereignty through enactment of preemptive laws, decisions to do so must be made in a deliberate manner, by Congress, through explicit exercise of its lawmaking power to that end. *See Whiting,* at 1980 ("Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause") (plurality opinion).

Where a federal statute lacks express preemptive language, then for a court to find preemption implicitly, requires an analysis that respects the constitutional scheme by refusing to impute lightly an intent to preempt. Rather, just as Congress is constitutionally charged with protecting State sovereignty to the greatest extent appropriate, so too should the judiciary approach questions of preemption with strict focus on Congress's intent. In so doing, preemption may only be implied if there is a plain and unambiguous manifestation of Congress's intent to preempt, as revealed by the ordinary meaning of the statutory text and scheme. *See Whiting*, at 1980 ("extrinsic aids

to construction may be used to solve, but not to create, an ambiguity") (plurality opinion) (quotation and citation omitted).

C. The Ordinary Meaning of the Atomic Energy Act Unambiguously Demonstrates that Congress *Did Not* Intend To Preempt States From Regulating Non-Radiological Activities.

In briefing the preliminary injunction, Entergy relied on sweeping pronouncements of the NRC's "exclusive authority over nuclear power plant operation," to contend that Vermont is preempted from imposing any requirement that would effectively prevent the Vermont Yankee Nuclear Station from operating when its current license expires in March 2012. *See e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Entergy Mem.") 15. Also in the context of seeking a preliminary injunction, Entergy broadly, and incorrectly,[1] argued that FERC has exclusive authority to regulate in non-radiological safety areas such as need and economics. *See* Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Preliminary Injunction ("Reply") 3 ("'need' and other economic questions are regulated only by FERC").

These arguments cannot prevail. As discussed above, only where Congress unambiguously exercises its power under the Supremacy Clause – either expressly or implicitly – should a federal law be given preemptive effect; otherwise the constitutional scheme would be violated, which would be the result if Entergy's arguments prevailed here. Proper preemption analysis must consider the ordinary meanings of the federal and

[1] *See Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("State and municipal authorities retain the right . . . to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission").

state statutes at issue within "the shape of the constitutional scheme," *Garcia* at 550, which is missing from Entergy's approach.

Far from express *preemption*, the Atomic Energy Act expressly *saves* and *preserves* a State's right to regulate nuclear facilities with respect to generation, sale, or transmission of electric power; and, further, in the Act, Congress expressly preserves a State's right to regulate nuclear power plants "for purposes other than protection against radiation hazards." *See generally, Whiting,* at 1981 (holding Arizona's licensing law is not expressly preempted because it "falls well within the confines of the authority Congress chose to leave to the States [in the savings clause]") (plurality opinion); *see also In re Petition of Verizon New England, Inc.*, 173 Vt. 327, 329 795 A.2d 1196, 1198 (2002) (rejecting Verizon's claim that state authority was preempted under the 1996 Telecommunications Act where that federal Act "preserves state authority to regulate the interconnection requirements of telecommunications carriers as long as such requirements are not inconsistent with the Act").

Thus, there can be neither express preemption – since express language *preserves* states right to regulate – nor field preemption – since Congress expressly did not occupy an entire field but rather reserved substantial areas to States. Therefore, the next consideration of a standard preemption analysis, as applied here, would be whether it is impossible to comply with both Vermont law and the Atomic Energy Act or whether compliance with Vermont law would frustrate or obstruct the purpose of the Atomic Energy Act. *See generally Wyeth* at 1194-1200. However, Entergy does not argue that any form of conflict exists, let alone that Congress would have intended preemption in the case of such a conflict.

Instead, Entergy challenges the motivation of the Vermont legislature in enacting the state laws at issue, arguing that if the legislators' motives were illicit, their action, even if apparently within the realm of authority reserved to the States by the Act's savings clauses, is preempted. *See e.g.*, Entergy Mem. 3, 20-21 & n.8; Reply 4-12 &n.2. *But see*, Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Vermont Opp.") at 20-24. For reasons stated above, looking to news articles, politicians' quips, or other extrinsic evidence cannot establish legislative intent – which is the proper objective of preemption analysis. *See Gregory* at 460; *see also Whiting,* at 1980 ("extrinsic aids to construction may be used to solve, but not to create, an ambiguity") (quotation and citations omitted) (plurality opinion).

Finally, this Court should give preemptive effect to the Atomic Energy Act here only if it concludes that the structure or language of the Act evidences an intent of Congress to abrogate Vermont's regulatory authority in relation to Vermont Yankee's operation after March 2012. Mere ambiguity as to Congress's intent is *not* license to imply preemption (and, Entergy does not attempt to demonstrate conflict preemption). Rather, there must be sufficient indication in the statutory scheme or language that Congress did, in fact, intend to preempt the type of state regulatory action being challenged. *See Wyeth,* at 1194-1200. Such a determination is critical to do justice to the constitutional scheme in which the Supremacy Clause was intended to operate. *See generally, Gregory* at 464, 470 (refusing to attribute to Congress an intent to intrude on state governmental functions in the face of ambiguity in the statute).

That determination may not reasonably be made here. Neither the language nor scheme of the Atomic Energy Act supports finding a congressional intent to abrogate

Vermont's regulatory authority in relation to Vermont Yankee's operation after March 2012. Indeed, it supports the opposite conclusion that Vermont's regulatory authority remains intact.

II. THE PREEMPTION QUESTION MUST BE DETERMINED BY REFERENCE TO THE AVOWED PURPOSE OF STATE LAW, NOT MOTIVATIONS ASCRIBED TO THE STATE LEGISLATURE BASED UPON COMMENTS OF INDIVIDUAL LEGISLATORS.

In briefing the preliminary injunction, Entergy relied heavily on its contention that the Vermont statutes in issue, Acts 74 and 160, are thin disguises for an effort to shut Vermont Yankee down due to safety concerns that are within the province of exclusive federal concern. But the Acts in question do not support this contention; on their own terms, they do not address radiological safety, and they do not purport to regulate plant construction or operation. Quite the contrary, by their own terms, they are intended to promote development of a "diverse, reliable, economically sound, and environmentally sustainable" power supply for Vermont (in the words of Act 74), and (in the case of Act 160) to ensure that energy facilities are not constructed or relicensed without evaluating their economic and environmental costs in light of the State's goal as stated under Act 74. As argued above and at length by Vermont, these purposes are not preempted by federal law.

And so Entergy asks the Court to disregard the avowed purposes of Acts 74 and 160, and to look instead at public expressions of concern about radiological safety at the plant, and to infer that these concerns have motivated the Vermont Legislature to invoke Acts 74 and 160 as a pretext for denying a Certificate of Public Good (CPG).

It is a strange argument indeed that would transmute legitimate and well justified expressions of concern about the operation of the plant ─ expressions which are of course doubly protected under the First Amendment as speech and as petitioning activity, and

protected again (with respect to state legislators) under the Speech and Debate Clause ─ into grounds for invalidating state legislative action under authorities that objectively are not preempted. An essential part of the legislative process is open, public debate of the issues, including testimony from individuals with relevant experience. To the extent individual witnesses offer opinions on whether a certain legislative approach may be unconstitutional under the Supremacy Clause, they are valid testimony of precisely the type that legislators should be considering and not "embarrassing gaffes," as Entergy characterizes them. Reply 1. Entergy's approach not only fails to consider the proper constitutional underpinnings of preemption theory, but would subvert the proper functioning of the legislative process by discouraging legislators from inviting public debate on the constitutionality of various approaches being considered. Moreover, here the statements cited by Entergy do not purport to represent the formal views of the Legislature or even the opinion (let alone a vote) of a majority; they are simply the occasional statements of a few.

But there is no warrant for Entergy's argument. The Supreme Court held expressly in *Pacific Gas & Electric*, that given Congress's long-standing preservation of a system of "dual regulation of nuclear powered electricity generation," state exercise of authority reserved to it by Congress is not subject to challenge on the basis of alleged illicit motivation. Rather, because "Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons . . . , it is for Congress [not the courts] to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective." *Id.* at 223.

Entergy has argued that *Pacific Gas & Electric* is distinguishable because the Court found, based on a legislative committee report, that the statute there in issue was concerned with nuclear waste disposal "as 'largely economic or the result of poor planning, not safety related'." Entergy Reply Brief at 6, *citing* and *quoting Pacific Gas & Electric,* 461 U.S. at 213. However, that is only half the story. In fact, even in the Supreme Court, California seems to have defended the statute on the basis that the State was free to "completely prohibit new construction until its safety concerns are satisfied by the Federal Government." *Id*. at 212. Although the Supreme Court rejected this argument, it did not conclude, based on this implicit concession that the State had acted at least partly from safety concerns, that the statute was preempted. Instead, the Court said, "it is necessary to determine whether there is a nonsafety rationale for the [statute]." *Id.* at 213. It was in the search for an alternative rationale that the Court resorted to the legislative committee report. *See id.*

And so, it is simply not accurate to say that *Pacific Gas & Electric* involved state legislative action motivated only by "permissible" state concerns. Indeed, in that case, unlike here, the State essentially conceded that its action was partly motivated by concerns regarding nuclear safety.[2] And having entirely missed this point, Entergy also

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[2] Furthermore, the petitioners in that case (including the United States), argued that the statute was the outgrowth of an initiative that had clearly been actuated by nuclear safety concerns, but the Court declined to consider those other statutes in determining whether the statute before it was preempted. *Id*. at 215. Indeed, in a publication explaining to California voters why they should vote against the initiative (which would ban nuclear plants), a legislative committee reasoned as follows:

> The [State Energy] commission does not have clear and explicit authority to condition its approval on demonstrations of waste disposal safety or reactor safety, but the same problems could be addressed *indirectly* through reviews of the

ignores entirely the import of the Court's conclusion that where a state may act for permissible as well as impermissible reasons, as was there the case, "*it is for Congress* to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. *The courts should not assume the role* which our system assigns to Congress." *Pacific Gas & Electric,* 461 U.S. at 223 (emphasis added).[3] *See also id*. at 216 ("inquiry into legislative motive is often an unsatisfactory venture. . . .[I]t would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction of new nuclear plants").

Conclusion

For the foregoing reasons, the Court should hold that Acts 74 and 160 are not preempted and should decline Entergy's invitation to inquire into the Vermont Legislature's motives in exercising its authority under those Acts.

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economics and reliability of the plant and through specific siting criteria (minimum distance from populated areas, minimum distance from active faults).

"Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and Its Alternatives" (1976), *quoted in* Petitioners' Brief at 21, *Pacific Gas & Elec. v. Energy Resources Comm'n*.

[3] Obviously this proposition, too, has a limit, but what Entergy here asks of the Court is pretty clearly what the Supreme Court said it should not do, namely plumb the motives of the Legislature when the avowed purpose of its action is permissible.

Respectfully submitted,

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Dated: September 1, 2011